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FEDERAL TRADE COMMISSION

Agency Information Collection Activities; Submission for OMB Review; Comment Request

AGENCY: Federal Trade Commission (“FTC” or “Commission”).

ACTION: Notice.

SUMMARY: The FTC intends to ask the Office of Management and Budget (“OMB”) to extend through December 31, 2016, the current Paperwork Reduction Act (“PRA”) clearance for the FTC’s enforcement of the information collection requirements in its Affiliate Marketing Rule (or “Rule”), which applies to certain motor vehicle dealers, and its shared enforcement with the Consumer Financial Protection Bureau (“CFPB”) of the provisions (subpart C) of the CFPB’s Regulation V regarding other entities (“CFPB Rule”). The current clearance expires on December 31, 2013.

DATES: Comments must be filed by [insert date 30 days after date of publication in the FEDERAL REGISTER].

ADDRESSES: Interested parties are invited to submit written comments electronically or in paper form by following the instructions in the Request for Comment part of the SUPPLEMENTARY INFORMATION section below. Write “Affiliate Marketing Disclosure Rule, PRA Comment: FTC File No. P0105411” on your comment, and file your comment online at <https://public.commentworks.com/ftc/affiliatemarketingpra2>, by following the instructions on the web-based form. If you prefer to file your comment on paper, mail or deliver your comment to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580.

FOR FURTHER INFORMATION CONTACT: Requests for additional information should

be addressed to Steven Toporoff, Attorney, Division of Privacy and Identity Protection, Bureau of Consumer Protection, Federal Trade Commission, 600 Pennsylvania Avenue, NW, NJ-8100, Washington, DC 20580, (202) 326-3135.

SUPPLEMENTARY INFORMATION:

On July 21, 2010, President Obama signed into law the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”).¹ The Dodd-Frank Act substantially changed the federal legal framework for financial services providers. Among the changes, the Dodd-Frank Act transferred to the CFPB most of the FTC’s rulemaking authority for the Affiliate Marketing provisions of the Fair Credit Reporting Act (“FCRA”),² on July 21, 2011.³ For certain other portions of the FCRA, the FTC retains its full rulemaking authority.⁴

The FTC retains rulemaking authority for its Affiliate Marketing Rule, 16 CFR 680, solely for motor vehicle dealers described in section 1029(a) of the Dodd-Frank Act that are predominantly engaged in the sale and servicing of motor vehicles, the leasing and servicing of motor vehicles, or both.⁵

On December 21, 2011, the CFPB issued its interim final FCRA rule, including the

¹ Pub. L. 111-203, 124 Stat. 1376 (2010).

² 15 U.S.C. 1681 *et seq.*

³ Dodd-Frank Act, at section 1061. This date was the “designated transfer date” established by the Treasury Department under the Dodd-Frank Act. *See* Dep’t of the Treasury, *Bureau of Consumer Financial Protection; Designated Transfer Date*, 75 FR 57252, 57253 (Sept. 20, 2010); *see also* Dodd-Frank Act, at section 1062.

⁴ The Dodd-Frank Act does not transfer to the CFPB rulemaking authority for FCRA sections 615(e) (“Red Flag Guidelines and Regulations Required”) and 628 (“Disposal of Records”). *See* 15 U.S.C. 1681s(e); Public Law 111-203, section 1088(a)(10)(E). Accordingly, the Commission retains full rulemaking authority for its “Identity Theft Rules,” 16 CFR Part 681, and its rules governing “Disposal of Consumer Report Information and Records,” 16 CFR Part 682. *See* 15 U.S.C. 1681m, 1681w.

⁵ *See* Dodd-Frank Act, at section 1029 (a), (c).

affiliate marketing provisions (subpart C) of CFPB's Regulation V.⁶ Contemporaneous with that issuance, the CFPB and FTC submitted to OMB, and received its approval for, that agency's respective burden estimates reflecting its overlapping enforcement jurisdiction with the FTC. The discussion in the Burden Statement below, following preliminary background information, continues that analytical framework of shared enforcement authority, as supplemented by the FTC's jurisdiction over auto motive dealers, as noted above.

On August 27, 2013, the FTC sought public comment on the information collection requirements associated with the Rule (August 27, 2013 Notice⁷), its shared enforcement with the CFPB of the provisions of the CFPB Rule, and the FTC's associated PRA burden analysis. No comments were received. However, the FTC is correcting and otherwise modifying certain estimates that appeared in the August 27, 2013 Notice: These adjustments are highlighted by footnotes appended to the revised figures that appear in the ensuing Burden Statement.

Pursuant to the OMB regulations, 5 CFR Part 1320, that implement the PRA, 44 U.S.C. 3501 et seq., the FTC is providing this second opportunity for public comment while seeking OMB approval to renew the pre-existing clearance for the Rule. All comments should be filed as prescribed herein, and must be received on or before [insert date 30 days after date of publication in the FEDERAL REGISTER].

For more background on the FTC's Affiliate Marketing Rule, see the August 27, 2013

⁶ 76 FR 79308. Subpart C of the interim final rule became effective on December 30, 2011. Subpart C is codified at 12 CFR 1022.20 *et seq.* Except for certain motor vehicle dealers (*see supra* note 5 and accompanying text), the disclosure and opt-out provisions described in the "Background" discussion below also pertain to Subpart C of Regulation V and the FTC's associated co-enforcement jurisdiction.

⁷ 78 FR 52918.

Notice.⁸

Burden Statement:

Under the PRA, 44 U.S.C. 3501-3521, federal agencies must get OMB approval for each collection of information they conduct or sponsor. “Collection of information” includes agency requests or requirements to submit reports, keep records, or provide information to a third party. 44 U.S.C. 3502(3); 5 CFR 1320.3(c). The FTC is seeking clearance for its assumed share of the estimated PRA burden regarding the disclosure requirements under the FTC and CFPB Rules.

Except where otherwise specifically noted, staff’s estimates of burden are based on its knowledge of the consumer credit industries and knowledge of the entities over which the Commission has jurisdiction. This said, estimating PRA burden of the Rule’s disclosure requirements is difficult given the highly diverse group of affected entities that may use certain eligibility information shared by their affiliates to send marketing notices to consumers.

The estimates provided in this burden statement may well overstate actual burden. As noted above, verbatim adoption of the disclosure of information provided by the federal government is not a “collection of information” to which to assign PRA burden estimates, and an unknown number of covered entities will opt to use the model disclosure language. Second, an uncertain, but possibly significant, number of entities subject to FTC jurisdiction do not have affiliates and thus would not be covered by section 214 of the FACT Act or the Rule. Third, Commission staff does not know how many companies subject to FTC jurisdiction under the Rule actually share eligibility information among affiliates and, of those, how many affiliates use such information to make marketing solicitations to consumers. Fourth, still other entities may

⁸ 78 FR at 52919.

choose to rely on the exceptions to the Rule's notice and opt-out requirements.⁹ Finally, the population estimates below to apply further calculations are based on industry data that, while providing tallies of business entities within industries and industry segments, does not identify those entities individually. Thus, there is no clear path to ascertain how many individual businesses have newly entered and departed within a given industry classification, from one year to the next or from one triennial PRA clearance cycle to the next. Accordingly, there is no ready way to quantify how many establishments accounted for in the data reflect those previously accounted for in the FTC's prior PRA analysis, i.e., entities that would already have experienced a declining learning curve applying the Rule with the passage of time. For simplicity, the FTC analysis will continue to treat covered entities as newly undergoing the previously assumed learning curve cycle, although this would effectively overstate estimated burden for unidentified covered entities that have remained in existence since OMB's most recent clearances for the FTC Rule.¹⁰

As in the past, FTC staff's estimates assume a higher burden will be incurred during the first year of a prospective OMB three-year clearance, with a lesser burden for each of the subsequent two years because the opt-out notice to consumers is required to be given only once. Institutions may provide for an indefinite period for the opt-out or they may time limit it, but for no less than five years.

⁹ Exceptions include, for example, having a preexisting business relationship with a consumer, using information in response to a communication initiated by the consumer, and solicitations authorized or requested by the consumer.

¹⁰ On December 21, 2010, OMB granted three-year clearance for the Rule through December 31, 2013 under Control No. 3084-0131. On February 3, 2012, OMB additionally approved under that control number FTC adjustments submitted on December 9, 2011 to reflect the effects of the Dodd-Frank Act, but the latter approval retained the previously accorded clearance expiration of December 31, 2013.

Staff's labor cost estimates take into account: managerial and professional time for reviewing internal policies and determining compliance obligations; technical time for creating the notice and opt-out, in either paper or electronic form; and clerical time for disseminating the notice and opt-out.¹¹ In addition, staff's cost estimates presume that the availability of model disclosures and opt-out notices will simplify the compliance review and implementation processes, thereby significantly reducing the cost of compliance. Moreover, the Rule gives entities considerable flexibility to determine the scope and duration of the opt-out. Indeed, this flexibility permits entities to send a single joint notice on behalf of all of its affiliates.

A. Non-GLBA Entities

Based, in part, on industry data regarding the number of businesses under various industry codes, staff estimates that 1,174,347 non-GLBA entities under FTC jurisdiction have affiliates and would be affected by the Rule.¹² Commission staff further estimates an average of 5 businesses per family or affiliated relationship, and believes that the affiliated entities will choose to send a joint notice, as permitted by the Rule. Thus, an estimated 234,869 non-GLBA business families may send the affiliate marketing notice.

Staff also estimates that non-GLBA entities under the jurisdiction of the FTC would each

¹¹ No clerical time was included in staff's burden analysis for GLBA entities as the notice would likely be combined with existing GLBA notices.

¹² This estimate is derived from an analysis of a database of U.S. businesses based on June 2013 SIC codes for businesses that market goods or services to consumers, which included the following industries: transportation services; communication; electric, gas, and sanitary services; retail trade; finance, insurance, and real estate; and services (excluding business services and engineering, management services). *See* <http://www.naics.com/search.htm>. This estimate excludes businesses not subject to FTC jurisdiction and businesses that do not use data or information subject to the rule. To the resulting sub-total (7,111,026), staff applies a continuing assumed rate of affiliation of 16.75 percent, *see* 75 FR 43526, 43528 n. 6 (July 26, 2010), reduced by a continuing estimate of 100,000 entities subject to the Commission's GLBA privacy notice regulations, *see id.*, applied to the same assumed rate of affiliation. The net total is 1,174,347.

incur 14 hours of burden during the prospective requested three-year PRA clearance period, comprised of a projected 7 hours of managerial time, 2 hours of technical time, and 5 hours of clerical assistance.

Based on the above, total burden for non-GLBA entities during the prospective three-year clearance period would be approximately 3,288,166 hours, cumulatively. Associated labor cost would total \$123,353,199.¹³ These estimates include the start-up burden and attendant costs, such as determining compliance obligations. Non-GLBA entities, however, will give notice only once during the clearance period ahead. Thus, averaged over that three-year period, the estimated annual burden for non-GLBA entities is 1,096,055 hours and \$41,117,733 in labor costs.

B. GLBA Entities

Entities that are subject to the Commission's GLBA privacy notice regulation already provide privacy notices to their customers.¹⁴ Because the FACT Act and the Rule contemplate that the affiliate marketing notice can be included in the GLBA notices, the burden on GLBA

¹³ The associated labor cost is based on the labor cost burden per notice by adding the hourly mean private sector wages for managerial, technical, and clerical work and multiplying that sum by the estimated number of hours. The classifications used are "Management Occupations" for managerial employees, "Computer and Mathematical Science Occupations" for technical staff, and "Office and Administrative Support" for clerical workers. See OCCUPATIONAL EMPLOYMENT AND WAGES —MAY 2012, U.S. Department of Labor released March 29, 2013, Table 1 ("National employment and wage data from the Occupational Employment Statistics survey by occupation, May 2012"): <http://www.bls.gov/news.release/pdf/ocwage.pdf>. The respective private sector hourly wages for these classifications are \$52.20, \$38.55, and \$16.54. Estimated hours spent for each labor category are 7, 2, and 5, respectively. Multiplying each occupation's hourly wage by the associated time estimate, labor cost burden per notice equals \$525.20. This subtotal is then multiplied by the estimated number of non-GLB business families projected to send the affiliate marketing notice (234,869) to determine cumulative labor cost burden for non-GLBA entities (\$123,353,199).

¹⁴ Financial institutions must provide a privacy notice at the time the customer relationship is established and then annually so long as the relationship continues. Staff's estimates assume that the affiliate marketing opt-out will be incorporated in the institution's initial and annual notices.

regulated entities would be greatly reduced. Accordingly, the GLBA entities would incur 6 hours of burden during the first year of the clearance period, comprised of a projected 5 hours of managerial time and 1 hour of technical time to execute the notice, given that the Rule provides a model.¹⁵ Staff further estimates that 3,350 GLBA entities under FTC jurisdiction would be affected,¹⁶ so that the total burden for GLBA entities during the first year of the clearance period would approximate 20,100 hours (3,350 x 6) and \$1,003,493 in associated labor costs.¹⁷

Allowing for increased familiarity with procedure, the PRA burden in ensuing years would decline, with GLBA entities each incurring an estimated 4 hours of annual burden (3 hours of managerial time and 1 hour of technical time) during the remaining two years of the clearance, amounting to 13,400 hours (3,350 x 4) and \$653,753 in labor costs in each of the ensuing two years.¹⁸ Thus, averaged over the three-year clearance period, the estimated annual burden for GLBA entities is 15,633 hours and \$770,333 in labor costs.

The cumulative average annual burden for both non-GLBA and GLBA for the prospective three-year clearance period is 1,111,688 burden hours and \$41,888,066 in labor costs. GLBA entities are already providing notices to their customers so there are no new capital or non-labor costs, as this notice may be consolidated into their current notices. For non-GLBA entities, the Rule provides for simple and concise model forms that institutions may use to

¹⁵ As stated above, no clerical time is included in the estimate because the notice likely would be combined with existing GLBA notices.

¹⁶ Based on the previously stated estimates of 100,000 GLBA business entities at an assumed rate of affiliation of 16.75 percent (16,750), divided by the presumed ratio of 5 businesses per family, this yields a total of 3,350 GLBA business families subject to the Rule.

¹⁷ 3,350 GLBA families x [(\$52.20 x 5 hours) + (\$38.55 x 1 hour)] = \$1,003,493.

¹⁸ 3,350 GLBA families x [(\$52.20 x 3 hours) + (\$38.55 x 1 hours)] = \$653,753.

comply. Thus, any capital or non-labor costs associated with compliance for these entities are negligible.

C. FTC Share of Burden: 560,609 hours; \$21,173,214, labor costs¹⁹

To calculate the total burden attributed to the FTC, staff first deducted from the total annual burden hours those hours attributed to motor vehicle dealers, which are in the exclusive jurisdiction of the FTC. Staff estimates that there are 60,959 motor vehicle dealerships subject to the Rule.²⁰ Of these, staff estimates that 10% are non-GLBA entities (6,096), and 90% are GLBA entities (54,863). Applying an assumed rate of affiliation of 16.75%, staff estimates that there are 1,021²¹ non-GLBA and 9,190 GLBA motor vehicle dealerships in affiliated families. Staff further assumes there are an average of 5 businesses per family or affiliated relationship, leaving approximately 204²² non-GLBA and 1,838 GLBA motor vehicle dealership families, respectively.

Staff further estimates that non-GLBA business families will spend 14 hours in the first year and 0 hours thereafter to comply with the Rule, while GLBA business families will spend 6 hours in the first year, and 4 hours in each of the following two years. The cumulative average

¹⁹ Previously stated as 560,179 hours and \$20,771,941 in the August 27, 2013 Notice, based on pre-corrected inputs, as further detailed below.

²⁰ This figure consists, in part, of 55,417 car dealers per NADA (franchise/new cars) (<http://www.nada.org/Publications/NADADATA/2011/default>) and NIADA data (independents/used cars) (<http://www.usedcarnews.com/news/2963-niada-survey-shows-more-action-online>), respectively, for 2011, multiplied by an added factor of 1.10 to cover for an unknown quantity of additional motor vehicle dealer types (motorcycles, boats, other recreational vehicles) also covered within the definition of motor vehicle dealer under section 1029(a) of the Dodd-Frank Act. This leaves a total of 60,959 motor vehicle dealers subject to the Rule.

²¹ Erroneously stated as 102 non-GLBA entities in the August 27, 2013 Notice.

²² Erroneously stated as 20 in the August 27, 2013 Notice.

annual burden for the non-GLBA and GLBA motor vehicle dealership families is 9,529 hours.²³

To calculate the FTC's total shared burden hours, staff deducted from the total burden hours (1,111,688 hours) those attributed to motor vehicle dealerships (9,529), leaving a total of 1,102,159 hours to split between the CFPB and the FTC. The resulting shared burden for the CFPB is half that amount, or 551,080 hours. To calculate the total burden hours for the FTC, staff added the burden hours associated with motor vehicle dealers (9,529 hours), resulting in a total burden of 560,609 hours.

Staff used the same approach to estimate the shared costs for the FTC. Staff estimated the costs attributed to motor vehicle dealers as follows: non-GLBA business families have \$35,714 in annualized labor costs,²⁴ and GLBA business families have \$422,648 annualized labor costs,²⁵ for cumulative annualized costs of \$458,362.²⁶

To calculate, on an annualized basis, the FTC's cumulative share of labor cost burden, staff deducted from the overall total (\$41,888,066)²⁷ the labor costs attributed to motor vehicle dealerships (\$458,362), leaving a net amount of \$41,429,704 to split between the CFPB and the

²³ 204 non-GLBA families x 4.666667 average hours = 952 hours; 1,838 GLBA families x 4.666667 average hours = 8,577 hours. The total is thus 9,529 hours. In the August 27, 2013 Notice the estimated total was 8,670 hours, but that reflected the pre-corrected input for the estimated number of non-GLBA motor vehicle dealership families.

²⁴ (204 non-GLBA families x \$525.20) ÷ 3 = \$35,714. Previously stated as \$3,501 in the August 27, 2013 Notice, but that reflected the pre-corrected input for the estimated number of non-GLBA motor vehicle dealership families.

²⁵ In the first year, GLBA families have \$550,573 costs: 1,838 x [(\$52.20 x 5 hours) + (\$38.55 x 1 hour)] = \$550,573. In each of the second and third years, GLBA families have \$358,686 in costs: 1,838 x [(\$52.20 x 3 hours) + (\$38.55 x 1 hour)] = \$358,686.

²⁶ Previously stated as \$426,149 in the August 27, 2013 Notice, but that reflected the pre-corrected input for the estimated number of non-GLBA motor vehicle dealership families.

²⁷ The August 27, 2013 Notice used \$41,117,733 as the total labor cost estimate from which to apportion between the FTC and CFPB, but that amount represented only the non-GLBA labor cost estimate while inadvertently excluding the estimate for GLBA-related labor cost.

FTC. The resulting shared burden for the CFPB is half that amount, or \$20,714,852. To calculate the total burden hours for the FTC, staff added the costs associated with motor vehicle dealers (\$458,362), resulting in a total cost burden for the FTC of \$21,173,214.

Request for Comment:

You can file a comment online or on paper. For the Commission to consider your comment, we must receive it on or before [insert date 30 days from FEDERAL REGISTER date of publication]. Write “Affiliate Marketing Disclosure Rule, PRA Comment: FTC File No. P0105411” on your comment. Your comment – including your name and your state – will be placed on the public record of this proceeding, including, to the extent practicable, on the public Commission Website, at <http://www.ftc.gov/os/publiccomments.shtm>. As a matter of discretion, the Commission tries to remove individuals' home contact information from comments before placing them on the Commission Website.

Because your comment will be made public, you are solely responsible for making sure that your comment doesn't include any sensitive personal information, like anyone's Social Security number, date of birth, driver's license number or other state identification number or foreign country equivalent, passport number, financial account number, or credit or debit card number. You are also solely responsible for making sure that your comment doesn't include any sensitive health information, like medical records or other individually identifiable health information. In addition, don't include any “[t]rade secret or any commercial or financial information which is obtained from any person and which is privileged or confidential,” as provided in Section 6(f) of the FTC Act, 15 U.S.C. 46(f), and FTC Rule 4.10(a)(2), 16 CFR 4.10(a)(2). In particular, don't include competitively sensitive information such as costs, sales

statistics, inventories, formulas, patterns, devices, manufacturing processes, or customer names

If you want the Commission to give your comment confidential treatment, you must file it in paper form, with a request for confidential treatment, and you have to follow the procedure explained in FTC Rule 4.9(c), 16 CFR 4.9(c).²⁸ Your comment will be kept confidential only if the FTC General Counsel grants your request in accordance with the law and the public interest.

Postal mail addressed to the Commission is subject to delay due to heightened security screening. As a result, we encourage you to submit your comments online. To make sure that the Commission considers your online comment, you must file it at <https://public.commentworks.com/ftc/affiliatemarketingpra2> by following the instructions on the web-based form. If this Notice appears at <http://www.regulations.gov/#!home>, you also may file a comment through that website.

If you file your comment on paper, write “Affiliate Marketing Disclosure Rule, PRA Comment: FTC File No. P0105411” on your comment, and on the envelope, and mail or deliver it to the following address: Federal Trade Commission, Office of the Secretary, Room H-113 (Annex J), 600 Pennsylvania Avenue, NW, Washington, DC 20580. If possible, submit your paper comment to the Commission by courier or overnight service.

The FTC Act and other laws that the Commission administers permit the collection of public comments to consider and use in this proceeding as appropriate. The Commission will consider all timely and responsive public comments that it receives on or before [insert date 30 days after date of publication in the FEDERAL REGISTER]. You can find more information,

²⁸ In particular, the written request for confidential treatment that accompanies the comment must include the factual and legal basis for the request, and must identify the specific portions of the comment to be withheld from the public record. *See* FTC Rule 4.9(c), 16 CFR 4.9(c).

including routine uses permitted by the Privacy Act, in the Commission's privacy policy, at <http://www.ftc.gov/ftc/privacy.htm>.

Comments on the information collection requirements subject to review under the PRA should additionally be submitted to OMB. If sent by U.S. mail, they should be addressed to Office of Information and Regulatory Affairs, Office of Management and Budget, Attention: Desk Officer for the Federal Trade Commission, New Executive Office Building, Docket Library, Room 10102, 725 17th Street, NW, Washington, D.C. 20503. Comments sent to OMB by U.S. postal mail, however, are subject to delays due to heightened security precautions. Thus, comments instead should be sent by facsimile to (202) 395-5167.

David C. Shonka
Principal Deputy General Counsel.

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